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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1970

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON, INC.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner Valentine R. Ciccone respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The decisions and orders of the District Court for the District of Rhode Island are not reported but are reproduced in Appendices A, B, and C (A-1 - A-20). The opinion of the Court of Appeals for the First Circuit apparently will be reported, however, the citation is unavailable at this time; the opinion is reproduced in Appendix D (A-21 - A-32).

Jurisdiction

The opinion of the court of appeals was filed and judgment entered on March 17, 1980.

Jurisdiction is conferred on this court by 28 U.S.C. §1254(1).

Question Presented

Did the Court of Appeals for the First Circuit Err in Holding That in a Deferral State an Age Discrimination Claimant Must in Order To Be Timely, File His Age Discrimination Charges With the Department of Labor Within 180 Days Rather Than 300 Days of the Alleged Act of Age Discrimination?

Statutes Involved

This case involves the interpretation and application of several sections of the Age Discrimination in Employment Act of 1967 (hereinafter ADEA), and specifically 29 U.S.C. §§626(d) and 633(b).

29 U.S.C. §626(d) provides:

> (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> > (1) within 180 days after the alleged practice occurred; or
> >
> > (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

> Upon receiving such a charge the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. §633(b) provides:

> (b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

Statement of the Case

Petitioner, Valentine R. Ciccone, was born on May 18, 1924. He was employed by Respondent, Textron, Inc., at its Gorham Division as Vice President, Administration, from May, 1971 until October, 1974 when he became Vice President, Administration, of the Homelite Division of Textron, Inc. He held that position until May 26, 1977 when he was terminated. In January, 1978 Ciccone learned that the position he once held at the Gorham Division was vacant. Thereupon,

Ciccone wrote to the President of Textron, Inc., Joseph B. Collinson, requesting reemployment as Vice President, Administration, of Gorham or any similar position. Ciccone's request was rejected by Collinson on January 9, 1978.[1] The Gorham position was later filled by one Brian O'Malley, a man in his late thirties or early forties.

On August 2, 1978 Ciccone filed age discrimination charges with the appropriate Rhode Island agency,[2] i.e., the Rhode Island Department of Labor, and the United States Department of Labor. The relevant allegation by Ciccone is that his application for employment at Gorham was rejected because of his age. Sixty days passed without action by either the state or federal authorities on Ciccone's claim. On October 10, 1978 Ciccone commenced this action in the United States District Court for the District of Rhode Island alleging age discrimination in violation of the ADEA. Jurisdiction was based on 28 U.S.C. §1337.

Respondent filed a motion to dismiss the complaint based on Ciccone's alleged failure to file timely charges with the state and federal authorities. Respondent argued that Ciccone had only 180 days within which to file with the administrative agencies and Ciccone filed 205 days after the alleged act of age discrimination. Ciccone argued that the alleged violations occurred in a "deferral state" and consequently he was entitled under 29 U.S.C. §626(d) to 300 days, not 180 days, to file his charges. The district court treated respondent's motion as a motion for summary judgment and held that Ciccone's claim was time barred by virtue of 29 U.S.C. §626(d)(2) since Cic-

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[1] Collinson's letter reads as follows:

> Dear Val:
>
> I think it would be a mistake for you to return to Gorham, but if any other position becomes available in which I think you would be interested, I'll contact you.

[2] Respondent's rejection of petitioner was in Rhode Island; consequently the alleged violation of the ADEA took place in Rhode Island.

cone filed with the state and federal agencies more than 180 days after the alleged act of discrimination.

On appeal the court of appeals "recognize[d] that the statute can be read, simplistically, as providing that the 300-day filing limit is automatically available to all plaintiffs residing in a deferral state even if plaintiff fails to initiate a state charge within 180 days." (Appendix D, A-29). The court of appeals also acknowledged that the Court of Appeals for the Ninth Circuit recently ruled that 300 days is the time limit for the filing of age discrimination charges in deferral states. Nevertheless, the Court of Appeals for the First Circuit rejected the opinion of the Court of Appeals for the Ninth Circuit and affirmed the holding and judgment of the District Court for the District of Rhode Island.

Reasons for Granting the Writ

A Clear Division of Opinion Exists Between the Circuit Courts of Appeal on the Issue of When a Charge of Age Discrimination Must Be Made in a Deferral State and

The Decision of the Court of Appeals for the First Circuit Is Contrary to Prior Proceedings of This Court.

The precise issue addressed by the Court of Appeals for the First Circuit in this case has been previously decided by the Court of Appeals for the Ninth Circuit. The circuit courts came to opposite conclusions. The First Circuit Court held in this case that an ADEA claimant in a deferral state must, as a prerequisite to commencing a law suit, file a charge of age discrimination with the Department of Labor within 180 days of the alleged discriminatory practice; the Ninth Circuit Court held that in such circumstances a claimant has 300 days, not 180 days, within which to file his charges with the Department of Labor. *Bean* v. *Crocker National Bank*, 600 F.2d 754,

759 (9th Cir. 1979). Petitioner submits that it is critical for this Court to define the length of what is in effect a statute of limitation upon age discrimination claims.

The ADEA provides a remedy and cause of action for a person aggrieved by age discrimination practices. 29 U.S.C. §§ 623, 626(c). Prior to instituting such action the claimant must file a charge with the Department of Labor. 29 U.S.C. §626(d). Furthermore, if the discriminatory practice occurred in a state which has a law prohibiting age discrimination in employment and establishing or authorizing a state authority to grant or seek relief from such discriminatory practice, then before proceeding to court the claimant must also commence proceedings under state law. 29 U.S.C. §633(b); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). States with such laws within the meaning of 29 U.S.C. §633(b) are commonly referred to as "deferral states". *Simpson* v. *Whirlpool Corp.*, 604 F.2d 997, 999 (6th Cir. 1979).

The filing time requirements for an ADEA claimant are set forth in 29 U.S.C. §626(d). A charge addressed to the Secretary of Labor shall be filed—

> (1) within 180 days after the alleged practice occurred; or
>
> (2) in a case to which §633(b) applies, within 300 days after the alleged wrongful practice occurred...

29 U.S.C. §626(d).

Ciccone's argument in the courts below was that the violation occurred in Rhode Island, a deferral state,[3] so that 29

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[3] 29 U.S.C. §633(b) defines what is meant by a "deferral state", i.e., a state

> which has a law prohibiting discrimination in employment because of age discrimination and establishing a state authority to grant or seek relief from such discriminatory practice.

Rhode Island has a statute which prohibits age discrimination in employment, R.I.G.L. 1956 (1968 Reenactment) §28-6-2, and authorizes the Director of Labor to investigate, §28-6-7, conciliate, §28-6-9, and, if necessary, to order the reinstatement of employees in the event of such unlawful practice, §§28-6-12, 14.

U.S.C. §633(b) applies to his case and therefore he was entitled to 300 days within which to file. Since he filed his administrative charges 205 days after the alleged discrimination, he contends that it was error to dismiss his action for tardy filing.

The First Circuit Court agreed that the statute can be read as providing 300 days to all claimants in deferral states. (Appendix D, A-29). The court went on, however, to hold that 29 U.S.C. §633(b) "applies" to extend the administrative filing time to 300 days only when the claimant had already filed his state claim within 180 days.

The ADEA is a remedial statute, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 761, and as such it should be given a liberal construction. *See Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967); *see also Love* v. *Pullman*, 404 U.S. 522, 527 (1972). Contrary to this principle the First Circuit Court by its holding wrote an additional phrase into 26 U.S.C. §626(d)(2) so that it effectively reads for cases within the First Circuit jurisdiction: "A charge shall be filed [with the Secretary of Labor]—(b) in a case to which §633(b) of this title applies *and where the claimant has filed a claim with his state authority within 180 days*, within 300 days...."

In *Bean* v. *Crocker National Bank, supra,* the Ninth Circuit Court, relying on the recent case of *Oscar Mayer & Co.* v. *Evans, supra,* held that in a deferral state the date a claimant files with the state authority is irrelevant for purposes of determining whether a claimant has 180 or 300 days within which to file with the Secretary of Labor. Therefore the Ninth Circuit Court had no difficulty in reading 29 U.S.C. §626(d)(2) exactly as it appears: In a case brought in a deferral state, i.e., "in a case to which section 633(b) applies," a claimant has 300 days after the alleged discriminatory practice to file with the Secretary of Labor. 600 F.2d at 758, 759. Since the Ninth Circuit Court held that 29 U.S.C. §626(d) "expressly permits a complainant in a deferral state to bring an action within 300 days....," 600 F.2d at 758, no construction of the statute was required.

While the Ninth Circuit Court relied upon *Oscar Mayer & Co.* in reaching its decision, the First Circuit Court relied upon pre-*Oscar Mayer & Co.* lower court opinions and it specifically disagreed with the Ninth Circuit Court that *Oscar Mayer & Co.* should have an influence on the issue of how long an ADEA claimant is allowed to file his claim. (Appendix D, A-29 - A-31). *Oscar Mayer & Co.* held that 29 U.S.C. §§633(b) provides that an ADEA claimant in a deferral state must commence proceedings under state law prior to bringing suit under 29 U.S.C. §626. While *Oscar Mayer & Co.* held that an ADEA claimant must file with the state authorities it held also that 29 U.S.C. §633(b) imposes no time limit on filing claims with state authorities. Rather, 29 U.S.C. §633(b) "requires only that state proceedings be commenced 60 days before federal litigation is instituted; besides commencement no other obligation is placed upon the ADEA grievant." 441 U.S. at 759.

As the Ninth Circuit Court noted, the date of filing with the state authorities is irrelevant. Consequently, it was error for the First Circuit Court to read into 29 U.S.C. §626(d) that which is not there and to consider the date of state filing to be a touchstone for when 29 U.S.C. §633(b) applies. *Oscar Mayer & Co.* explains that 29 U.S.C. §633(b) requires only that in deferral states claimants must file claims with state authorities before bringing suit. Ciccone complied with this requirement. It was unnecessary and error for the First Circuit Court to hold that 29 U.S.C. §§626(d) and 633(b) require anything more than what is unambiguously stated therein.

The question of when an ADEA claim must be filed in a deferral state is critical. As occurred in this case a claimant may be barred, as effectively as he might be if he allowed a statutory limitation period to lapse, by late filing. Age discrimination claimants ought to know when they must take action before their claims are extinguished as a matter of law. It is respectfully submitted that the queston presented herein is of sufficient importance to warrant this Court's review.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted so that the judgment and decision of the United States Court of Appeals for the First Circuit may be reviewed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 78-0564

VALENTINE R. CICCONE

v.

TEXTRON, INC. and
JOSEPH B. COLLINSON

OPINION

PETTINE, *Chief Judge*. This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621 *et seq*. Plaintiff alleges that the defendants illegally based their decision to terminate his employment with the Homelite division of Textron upon his age. He further alleges that illegal age discrimination is the basis for the defendants' refusal to rehire him in his former position in the Gorham division of Textron or in any other position with Textron. Jurisdiction is premised upon 28 U.S.C. §1337.

The defendants now move for dismissal of the action on the bases that plaintiff failed to file timely charges with the Secretary of Labor, a prerequisite to obtaining judicial relief under the ADEA, and that plaintiff failed to file timely proceedings with the appropriate state agency, also allegedly a prerequisite to suit under the ADEA.[1] In response, plaintiff

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[1] While it is clear that the filing of charges with the Secretary of Labor is a prerequisite to suit under the ADEA, the courts have differed on whether resort to an appropriate state agency is also a prerequisite. *Compare Reich* v. *Dow Badische Co.*, 575 F.2d 363 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3391 (Dec. 4, 1978) (No. 78-5568) and *Hadfield* v. *Mitre Corp.*, 459 F. Supp. 829 (D. Mass. 1978) (state filing a prerequisite) *with Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (en banc) and *Evans* v. *Oscar Mayer & Co.*, 580 F.2d 298 (8th Cir. 1978), *cert. granted*, 47 U.S.L.W. 3301 (Oct. 30, 1978) (No. 78-275) (state filing not a prerequisite). Because of the result reached in this case, the Court does not reach this issue.

argues that he has fulfilled the appropriate requirements. For the reasons which follow, the Court finds that the plaintiff has failed to fulfill the requirements of the ADEA, but may attempt to prove facts which might entitle him to equitable consideration tolling the time within which he had to file.

Plaintiff was employed until May 26, 1977 as Vice President-Administration of the Homelite Division of Textron, Inc. at its principal offices in Charlotte, North Carolina. Prior to this, he had held the same job with the Gorham Division of Textron. On May 26, 1977 his employment was terminated, and plaintiff did no work for Textron subsequent to that date. He did, however, continue to receive pay and benfits through August 31, 1977, and received in a lump sum an additional three months' pay in early September, 1977. The plaintiff was unable to obtain another job. On January 4, 1978, after learning that his former position at Gorham was now vacant, he wrote the defendant Collinson, President of Textron, requesting reemployment in his former position or any similar position that might be available. On January 9, Mr. Collinson wrote that "it would be a mistake for you to return to Gorham, but if any other position becomes available in which I think you would be interested, I'll contact you." The position at Gorham has remained unfilled. Plaintiff was not contacted subsequently regarding any employment possibilities.

On August 2, 1978, plaintiff mailed a charge of age discrimination to the Charlotte-Mecklenburg Community Relations Committee, an agency of the state of North Carolina. He sent the same charge to the Director of Labor of the State of Rhode Island and the United States Department of Labor in Charlotte and in Providence on that day. On October 10, 1978, he filed the current action.

29 U.S.C. §626(c) authorizes an individual to bring a civil action for relief from age discrimination.[2] Section 626(d) states

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[2] 29 U.S.C. §626(c) provides:

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable

that such civil action cannot be commenced unless a charge alleging unlawful discrimination is filed with the Secretary of Labor within 180 days after the discriminatory practice occurred and 60 days has elapsed following the filing of the charge. However, if a state has a law prohibiting age discrimination and "estasblishing or authorizing a State authority to grant or seek relief from such discriminatory practice", 29 U.S.C. §633, the individual has 300 days to file with the Secretary of Labor. 29 U.S.C. §626(d)(2)[3].

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relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

[3] 29 U.S.C. §626(d) provides:

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred;

or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. §633(b) provides:

(b) In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employent because of age and establishing or authorizing a State

Defendants contend that the August 2, 1978 filing was more than 180 days after the May 28, 1977 termination and that therefore he is barred from bringing this action. Plaintiff responds that the actual termination date was November 30, 1977, because he received 6 months' severance pay, and that the 300-day requirement of section 626(d)(2) applies because he filed charges with the appropriate state agencies on August 2, 1978. These arguments must be rejected.

Numerous courts have faced the question of what constitutes the termination date when the date at which the employee ceased to work or was notified of his termination differs from the administrative termination date or the end of severance benefits. *See, e.g., Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 47 U.S.L.W. 3221 (U.S. Oct. 2, 1978); *Kephart* v. *Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Payne* v. *Crane Co.*, 560 F.2d 198 (5th Cir. 1977); *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), *on remand*, 13 FEP Cases 347 (E.D. Mo. 1975), *aff'd*, 550 F.2d 1113 (8th Cir. 1977); *Davis* v. *RJR Foods, Inc.*, 420 F.Supp. 930 (S.D.N.Y. 1970), *aff'd without opinion*, 556 F.2d 555 (2d Cir. 1977). With the exception of *Moses*, these decisions all held that the filing

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authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

period of section 626(d) begins to run when the employee has been given unequivocal notice of termination and he in fact ceases to work for the employer. The court finds the reasoning of the *Bonham* decision particularly persuasive:

> We reject the rule propounded in [*Moses*] which looks exclusively to the company's official termination date as reflected in company records. Because...a company may use different termination dates for different purposes, the *Moses* rule does not adequately resolve the issue. Moreover, we would be wary of any approach which determines the timeliness of an employee's suit against his employer solely on the basis of records which are within the exclusive control of the employer. On the other hand, we would also view with disfavor a rule that penalizes a company for giving an employee periodic severance pay or other extended benefits after the relationship has terminated rather than severing all ties when the employee is let go.
>
> 569 F.2d at 191.

Moses involved a peculiar fact situation; there the plaintiff's final day of work was followed by a previously scheduled week of vacation and then a previously accrued week of vacation before the company considered her officially terminated. The employer had recognized the later date as the termination date for the purposes of its personnel records, although the trial court later found that it did continue to pay severance pay for seven additional months. *Moses* v. *Falstaff Brewing Corp.*, 13 FEP Cases 347, 348 (E.D. Mo. 1976), *aff'd*, 550 F.2d 1113 (8th Cir. 1977). The Court held that the official termination date should be controlling, in order to eliminate ambiguity and further the humanitarian purposes of the act, and in light of the short period of time between when Ms. Moses stopped work and was terminated for administrative purposes. No other circuit court has reached the same result. Furthermore, *Moses* is not inconsistent with the holdings in *Kephart*,

Bonham, *Davis*, and *Payne*, *supra*, that the continuance of severance pay beyond the date on which a plaintiff ceases to work does not toll the running of the filing period.

Consequently, the Court finds that for the purposes of section 626(d) plaintiff was terminated on May 26, 1977. Therefore, his filing with the Secretary of Labor on August 2, 1978, 433 days after termination, was untimely, whether the 180-day or 300-day period applies.

Plaintiff argues, however, that he is entitled to equitable modification of the time limit for filing charges. Although a few courts have reached the opposite conclusion, *see, e.g.*, *Raynor* v. *Great Atl. & Pac. Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975), most courts faced with the issue have held that the time requirements of ADEA are not jurisdictional prerequisites to maintaining an action, rather that they operate more in the nature of a statute of limitation and hence are subject to equitable modifications, such as tolling and estoppel. *See Gabriele* v. *Chrysler Corp.*, 573 F.2d 949 (6th Cir. 1978), *petition for cert. filed*, 47 U.S.L.W. 3009 (U.S. July 18, 1978) (No. 78-1); *Bonham* v. *Dresser Industries, Inc.*, *supra*; *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977); *Skoglund* v. *Singer Co.*, 403 F.Supp. 797 (D.N.H. 1975).

This approach was approved by the Conference Report accompanying the Age Discrimination Act Amendments of 1978, P.L.95-256, codified at 29 U.S.C. §§621 *et seq.* Although the amendments did not change the statutory provision, the report noted:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. *See e.g.*, *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an evenly divided court*, [434 U.S. 99], 98 S.Ct. 600 (1977); *Bonham* v. *Dresser Industries, Inc.*, [569 F.2d 187] (3d

Cir. 1977), [*cert. denied*, 47 U.S.L.W. 3221 (Oct. 2, 1978)]; *Charlier* v. *S. C. Johnson & Son, Inc.*, 556 F.2d 761 (5th Cir. 1977).

Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 12 (1978). Although this statement is not entitled to the same weight as the legislative history compiled by the Congress which adopted the act, *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968), it suggests strongly that Congress approves this approach to the ADEA's filing periods.

Additionally, this Court has held in an analogous context that the similar time periods required in Title VII cases are non-jurisdictional and subject to equitable modification. *Partin* v. *Hemingway Transport, Inc.*, C.A. No. 75-149, slip op. at 7 (D.R.I. Nov. 8, 1976). This Court also notes that the ADEA is remedial and humanitarian legislation which should therefore be accorded a liberal interpretation, and that "strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights." *Dartt* v. *Shell Oil Co.*, 539 F.2d at 1260 and cases cited therein. We hold, therefore, that the filing time requirements of section 626(d) are subject to equitable modification and estoppel.

Judge Bownes, in *Abbott* v. *Moore Business Forms, Inc.*, 439 F. Supp. 643 (D.N.H. 1977), noted five considerations that indicate the tolling of the statute might be proper:

> Factors suggesting the appropriateness of tolling and which must be weighed in this case include: lack of actual notice of the filing requirement, *Powell* v. *Southwestern Bell Telephone Company*, 494 F.2d 485, 487 (5th Cir. 1974); lack of constructive knowledge, *e.g.* as where one has secured an attorney, who is thereby charged with presumptive knowledge of the law's requirements, *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1197 (5th Cir. 1975); diligence in pursuing one's rights, *Dartt* v. *Shell Oil Co.*, *supra*; absence of pre-

judice to defendant, *Love* v. *Pullman Co., supra,* 404 U.S. at 526 (1972); plaintiff's reasonableness in remaining ignorant of the notice requirement *cf. Melendez* v. *Singer-Friden Corp.*, 529 F.2d 321, 324-325 (10th Cir. 1976).

439 F. Supp. at 646.

As the discussion below indicates, these factors are particularly applicable in the present case.

Plaintiff has submitted an affidavit which states that prior to July 25, 1978 he had no knowledge of the notice provisions of the ADEA, that he had at no time while employed by Textron been advised of his rights under the ADEA, and that Textron did not post notices pertaining to the ADEA in places prominent and accessible to him as is required by 29 U.S.C. §627 and 29 C.F.R. §850.10.[4] As Judge Bownes noted in *Abbott, supra,* failure to be aware of one's rights is a factor which should be considered in determining whether to toll the filing requirement. Additionally, several cases have suggested that where an employer has failed to post the notice required by section 627, the employee can be excused from his failure to file timely notice of intent to sue. *Bonham* v. *Dresser In-*

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[4] 29 U.S.C. §627 provides:

> Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

The Secretary has implemented this provision through promulgation of 29 C.F.R. §850.10, which provides:

> Every employer, employment agency, and labor organization which has an obligation under the Age Discrimination in Employment Act of 1967 shall post and keep posted in conspicuous places upon its premises the notice pertaining to the applicability of the Act prescribed by the Secretary of Labor or his authorized representative. Such a notice must be posted in prominent and accessible places where it can readily be observed by employees, applicants for employment and union members.

dustries, Inc., supra; *Charlier* v. *S. C. Johnson & Son, Inc., supra*; *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc., supra*; *Skoglund* v. *Singer Co., supra.*

However, the defendants have submitted an affidavit which states that the plaintiff, as Vice President-Administration for the Homelite Division, was responsible for all personnel functions, including that the ADEA notices were prominently posted. The affidavit of Robert Babb states that the required posters were posted on bulletin boards in Homelite's Personnel Department within two weeks of the September 5, 1975 date Homelite moved into its present facilities; that they have been posted there continuously; and that the plaintiff frequently passes the bulletin board. Additionally, two further affidavits testify to the continuous presence of these posters on the Personnel Department's bulletin board. Such evidence, if believed, not only controverts plaintiff's affidavit but would suffice to put plaintiff, at a minimum on constructive notice of the ADEA's requirements. If plaintiff was responsible for informing employees of their rights, by insuring that the ADEA notices were posted, he quite clearly would be estopped from asserting his own ignorance. *Adams* v. *Federal Signal Corp.*, 559 F.2d 433 (5th Cir. 1977); *Malinowski* v. *State Farm Ins. Co.*, 18 FEP Cases 693 (W.D. Pa. 1978); *Skoglund* v. *Singer Co.*, 13 FEP Case 253 (D.N.H. 1975) (dismissing *Skoglund* v. *Singer*, 403 F.Supp. 797, following factual hearing). Similarly, if he regularly passed by the bulletin board upon which the notice was posted, he would have to be held to constructive notice. Because these affidavits are in conflict, it is necessary to hold a hearing at which plaintiff may present evidence as to his entitlement to the exercise of equitable considerations for his failure to timely file. In determining whether to exercise its equitable discretion, the Court can of course consider any relevant factor; but it will consider in particular those outlined by Judge Bownes in *Abbott* v. *Moore Business Forms, Inc., supra.*

In addition to his claim for equitable considerations, plaintiff also argues that the refusal of defendant to rehire him on January 9, 1978, constituted a separate violation of the ADEA, and that the continuing refusal to rehire him after that date creates a continuing violation. The latter argument is of little merit. Virtually all the courts faced with such an allegation have held that in the absence of a contractual or other legal duty to rehire, refusal to rehire does not create a continuing violation tolling the filing deadlines. Continuing effect is not tantamount to continuing violation. *United Airlines* v. *Evans*, 431 U.S. 553 (1977) (Title VII); *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142, 1149 (7th Cir. 1978) (Title VII); *Hiscott* v. *General Electric Co.*, 521 F.2d 632, 635 (6th Cir. 1975) (ADEA); *Powell* v. *Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974) (ADEA).

The only exception which this court has discovered is *Thomas* v. *E. I. DuPont de Nemours & Co.*, 574 F.2d 1324 (5th Cir. 1978). There the court, while holding to its rule that discharge followed by refusal to rehire does not create a continuing violation, *Woodburn* v. *LTV Aerospace Corp.*, 531 F.2d 750 (5th Cir. 1976), did hold that DuPont's refusals to reinstate the plaintiff to his prior job, to transfer him back to his former location, or to hire him for a subsequent opening could constitute separate ADEA violations. The Court carefully limited the scope of its holding, however:

> We in no way mean to indicate that once an employee goes on record to express displeasure with an employer's action and thereafter holds his peace, the company can be liable for failing to remember the initial employee complaint every time a job for which he is qualified becomes available. Such a rule would be unfair, especially when a very large company like DuPont is involved. We merely hold that once 180 days have passed after one unlawful act, an employer cannot ignore

> untime-barred attempts within the company to rectify the original wrong and thereby violate the ADEA anew with impunity.
>
> 574 F.2d at 1331.

Under even this more liberal approach, then, simply reapplying for one's old job cannot serve to begin the running of the 180-day period anew; there must clearly be a new, separate violation. Were simple reapplication allowed to start the time period anew, the purpose of the time limitation would be completely frustrated: a stale claim could be resurrected at any time by such action.

Consequently, even under the holding of the *Thomas* case, plaintiff's reliance on a continuing violation as the basis for tolling the filing time requirement must fail. He must allege a specific act; he cannot rely simply upon the language in the letter sent to him by the defendant Collinson on January 9, 1978 that "if any other position becomes available in which I think you would be interested, I'll contact you" to establish a continuing series of refusals to rehire.

Plaintiff's suggestion that the refusal to rehire him in the Gorham division constitutes a separate violation has somewhat more merit, however. He did make a specific application for the job and was rejected by the letter of January 9. Defendants properly argue that, like allegations that a refusal to rehire constitutes a continuing violation, a refusal to rehire cannot constitute a separate violation. *In re Consolidated Pretrial Proceedings in the Airline Cases, supra*; *Clark* v. *Emerson Mfg. Co.*, 430 F.Supp. 216 (N.D. Miss. 1977); *Brohl* v. *Singer Co.*, 407 F.Supp. 936 (M.D. Fla. 1976); *Chant* v. *United States Postal Service*, 14 FEP Cases 839 (N.D. Tex. 1976). However, here the plaintiff is alleging a refusal to rehire for a different position, not simply an effort to be reinstated in the job from which he was terminated. Consequently, refusal to hire him for this position might be shown to be the result of a separate act of age discrimination.

Defendants, however, suggest that the January 9 rejection cannot constitute a separate violation inasmuch as the position was never filled. According to the uncontroverted affidavit of J. Joseph Kruse, Senior Vice President-Administration of Textron, the job of Vice President-Administration, at the Gorham Division "has not been filled since January 4, 1978, and presently does not exist, for the duties of such position have been delegated to other employees." In the absence of a position to be filled, it has been held that a refusal to hire cannot constitute a new violation. *Powell* v. *Southwestern Bell Tel. Co.*, 494 F.2d at 489. This removes the present case from the purview of *Thomas*, as well, inasmuch as the court there found the basis for a separate ADEA violation could exist in an allegation that a younger man was hired for a subsequent opening for which the plaintiff had applied. 574 F.2d at 1331. Therefore, the Court concludes that plaintiff cannot rely upon the Jan. 9 refusal to rehire as a new violation.

Even were the Court to construe the Jan. 9 refusal to rehire as a separate violation, plaintiff's complaint would be time-barred. His August 2, 1978 notice to the Department of Labor was almost a month after the 180-day filing requirement. Plaintiff's argument that by filing with the appropriate state agencies on the same day, he is entitled to the 300-day period of section 626(d)(2), is without merit. In effect, he argues that the federal cause of action can be resurrected by filing with a state agency after the 180 days have passed. The Court must reject that argument. The purposes of the extended period when a claim is filed initially with a state agency are clearly to encourage resort to state remedies in the first instance and to allow the state time within which to attempt to resolve the complaint before federal intervention is triggered. Under plaintiff's interpretation, however, an individual could then ignore with impunity the 180-day deadline, and by filing a complaint with both the state and the federal government on the 300th day, resurrect what was previously a time-barred complaint. As the Sixth Circuit noted in *Gabriele* v. *Chrysler Corp.*, *supra:*

> One obtains the benefits of the extended filing period in §626(d)(2) *only* if he is in a "deferral state" *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. *Cf. Skoglund* v. *Singer Co.*, 403 F. Supp. 797, 803 (D.N.H. 1975) [failure to file state complaint before 180 days subjects plaintiff to 180 day filing requirement]. It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. Furthermore, any state filing need only be made within the minimum 180 days allowed for the federal filing, §626(d)(1), in order to obtain the benefits of §626(d)(2) (emphasis in original).
> 573 F.2d at 955.

Therefore, even if the Jan. 9 refusal is a separate violation, plaintiff's complaint is barred for failure to comply with section 626(d), unless, as with his complaint regarding his initial termination, discussed *supra*, he can demonstrate that he is entitled to equitable consideration.

The Court finds that, for the purposes of the filing requirements of 29 U.S.C. §626(d), plaintiff's employment terminated on May 26, 1977. Consequently, his complaint is time-barred and this Court is without jurisdiction unless he can prove facts entitling him to equitable consideration in accordance with this opinion. The Court also finds that there is no continuing violation, and that the refusal to rehire on Jan. 9, 1978, did not constitute a separate violation. Finally, the Court finds that even if the Jan. 9 refusal to rehire constitutes a separate violation, it is also time barred unless the plaintiff can demonstrate entitlement to equitable considerations. Because a hearing is necessary to prove such facts, the parties are given 60 days from the date hereof to complete discovery. The matter is assigned for hearing on April 25, 1979, at 8:30 a.m.

An order will be prepared in accordance with this opinion.

(s) RAYMOND J. PETTINE, *Chief Judge*
February 5, 1979

APPENDIX B

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 78-564

VALENTINE R. CICCONE

v.

TEXTRON, INC., and
JOSEPH B. COLLINSON

MEMORANDUM AND ORDER

MOTION TO RECONSIDER

On February 5, 1979, this Court issued its Opinion regarding defendants' motion to dismiss and a Memorandum and Order regarding defendants' motion to limit discovery. In reference to the motion to dismiss, the court held that plaintiff had failed to timely file charges with the Secretary of Labor, a prerequisite to obtaining judicial relief under the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. §§621 *et seq*. However, the Court also held that the plaintiff was entitled to attempt to prove facts entitling him to equitable consideration. Consequently, the Court scheduled a hearing for this purpose and issued an order limiting discovery to this issue only. That hearing is now scheduled for May 4, 1979 at 9:00 a.m.

Plaintiff now moves for reconsideration of that portion of the Court's February 5, 1979 Opinion which found, on the basis of an uncontroverted affidavit, by J. Joseph Kruse, Senior Vice President-Administration of Textron, that the defendants' refusal to rehire the plaintiff on January 4, 1978, could not form the basis for a new violation of the ADEA, because the position plaintiff then sought no longer existed. In support of his motion, plaintiff offers his own testimony at a deposition taken by the defendants on February 23, 1979. This

testimony was to the effect that plaintiff had learned from various unnamed sources that, contrary to the affidavit filed by Mr. Kruse, his former position as Vice President of Administration of the Gorham Division was filled by one Brian O'Malley following the defendants' January 4 refusal to rehire the plaintiff. Consequently, plaintiff asks the Court to reconsider its finding that the January 4 refusal to rehire was not a separate violation of the ADEA.

The Court does not find it necessary to decide at this time whether plaintiff's motion should be granted.

The February 5 Opinion specifically held that

> ...even if the January 9 refusal to rehire constitutes a separate violation, it is also time-barred unless the plaintiff can demonstrate entitlement to equitable considerations.
>
> Slip op. at 15.

Consequently, it is necessary for the plaintiff to prove he is entitled to equitable consideration for his failure to timely file his complaint with the Secretary of Labor within 180 days after January 9. Only if he can first prove such entitlement will it be necessary to decide whether the Court should now modify its February 5, 1979 Opinion. Therefore, the motion to reconsider is passed. Plaintiff shall have leave to renew the motion should the Court find that he has demonstrated entitlement to equitable considerations.

By Order,
(s) MICHELE L. HASTINGS
Deputy Clerk

Enter:
(s) RAYMOND J. PETTINE
Chief Judge

April 13, 1979

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF RHODE ISLAND

C.A. No. 78-0564

VALENTINE R. CICCONE

v.

TEXTRON, INC, and
JOSEPH B. COLLINSON

MEMORANDUM, OPINION AND ORDER

This is an action under the Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§621 *et seq.;* plaintiff complains that his employment with the Homelite division of Textron was terminated in violation thereof. The matter is before the Court on the defendants' motion to dismiss.

Jurisdicton is premised upon 28 U.S.C. §1337.

On February 5, 1979 I ruled in this case that, "for the purposes of filing requirements of 29 U.S.C. §626(d), [the plaintiff's] complaint [was] time-barred and this Court [was] without jurisdiction unless he [could] prove facts entitling him to equitable consideration...". Slip op. at p. 15. For this purpose a hearing was held and it must now be decided, on the record of said hearing, whether the plaintiff has sustained his burden of proof.

In the February 1979 opinion the Court passed on the limitations of 29 U.S.C. §626(d) and held that the filing time requirements are subject to equitable modification and estoppel. Though the defendants argue that the time for filing a notice of intent to sue is not subject to equitable tolling, I adhere to my ruling to the contrary.

In *Abbott* v. *Moore Business Forms, Inc.*, 439 F.Supp. 643 (D.N.H. 1977), the Court enumerated five factors which indicate the tolling of the statute:

Factors suggesting the appropriateness of tolling and

> which must be weighed in this case include: lack of actual notice in the filing requirement, *Powell* v. *Southwestern Bell Telephone Company*, 494 F.2d 485, 487 (5th Cir. 1974); lack of constructive knowledge, *e.g.*, as where one has secured an attorney, who is thereby charged with presumptive knowledge of the law's requirements, *Edward* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1197 (5th Cir. 1975); diligence in pursuing one's rights, *Dartt* v. *Shell Oil Co.*, *supra*; absence of prejudice to a defendant, *Love* v. *Pullman Co.*, *supra.*, 404 U.S. at 526 (1972); plaintiff's reasonableness in remaining ignorant of the notice requirement. *Cf. Melendez* v. *Singer Friden Corp.*, 529 F.2d 321, 324-325 (10th Cir. 1976).

Ciccone v. *Textron*, *supra*, at p. 2. For the reasons set forth, *infra*, I find the plaintiff has failed to satisfy the requirements of the ADEA; he has not presented facts which entitle him to equitable consideration.

The plaintiff's employment with the Gorham and Homelite divisions of the defendant company spanned approximately six years. He served as Vice-President-Administration charged with the responsibilities of the personnel department. The Director of Industrial Relations and Personnel Management testified that any authority to create or implement any personnel policies or procedures had to come from the plaintiff. These procedures included the development of the Homelite policy proscribing age discrimination. Indeed, Mr. Ciccone testified that he controlled six people and was aware that it was against the law "to discriminate based on age...in employment," and that employees be advised of this law. In spite of this he states he knew nothing of the specifics of the Act and took no steps to assure that he and other employees were informed of their rights under the ADEA.

Section 8 of the ADEA, 29 U.S.C. §627, requires the posting of informational notices about the Act. It is uncontradicted

that that was done in the personnel department which the plaintiff frequented. The employment supervisor testified that she saw the plaintiff in the personnel office on three or four occasions over a period of two years and that on one of these visits the plaintiff was looking directly at the bulletin board on which the age discrimination notice was affixed.

Following his discharge on May 27, 1977, the plaintiff consulted two attorneys by telephone and told them he had no knowledge of any reason for his discharge "other than possibly age." As the plaintiff testified, both attorneys "indicated that indeed employers have the right to fire people even if they have brown eyes and don't have the right brown eyes, that I would have a devil of a time proving age discrimination and that so don't bother."

In July of 1978 the plaintiff was consulting an attorney on a matter not related to this case. This attorney gave him a newspaper article which reported a plaintiff's jury verdict in an age discrimination case. He testified he "suppose[d]" he would not have pursued this case but for the article given to him by this lawyer; as a result, charges were filed on August 2, 1978 and the present action on October 10, 1978.

The defendants cite a number of cases, *Oscar Mayer & Co.* v. *Evans*, __ U.S. __, 47 U.S.L.W. 4569 (1979); *Smith* v. *American President Lines Ltd.*, 571 F.2d 102, 109, n.12 (2nd Cir. 1978); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Gardner* v. *Panama R. Co.*, 324 U.S. 29 (1951); *Burnett* v. *N.Y. Central R.R. Co.*, 380 U.S. 424, 429 (1965); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 469, n.14 (1975) as decisional teachings establishing the outside parameters for tolling time limitations. In holding that the filing period of §626(d) is subject to equitable modification Judge Bownes in *Abbott*, *supra*, noted that the Supreme Court in the cases cited *supra*, recognized the general applicability of equitable tolling factors to statutes of limitations. In keeping with such holdings, he developed the test involving the five factors set forth, *supra*.

Applying these criteria to the case at issue, I find that even if it were conceded the plaintiff lacked actual notice, I agree with the defendant that the reasoning of the Fifth Circuit Court of Appeals should apply:

> "Ignorance of...legal rights or failure to seek legal advice [does] not toll the statute of limitations." To hold that lack of "cognizance" of ADEA rights tolled the 180-day notice provision, would effectively repeal §626(d)(1). A result which we cannot sanction. *Quina* v. *Owens-Corning Fiberglass Corp.*, 575 F.2d 1115, 1118 (5th Cir. 1978) (citations omitted)

At any rate, I find the plaintiff had constructive knowledge of his ADEA rights; it would be illogical to conclude otherwise in the face of the notices that were posted in the personnel office under the direct authority of Mr. Ciccone, and more especially in light of the evidence that he not only frequented this office but on at least one occasion was seen directly facing the bulletin board from a distance of seven feet. Arguably, standing alone this might not be enough, but in addition there are the telling facts of his position as Vice-President-Administration, belief that his responsibilities required informing employees of their rights, which he apparently neglected, and finally the consultations he had with two attorneys within two months of the time of his discharge. As pointed out, he told them his age may possibly have been a cause for his termination.

> We feel constrained to point out that, even if the 180-day period could be waived, this is a singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180-day period ran. In such a circumstance he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. *Edwards* v. *Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

This evidence, coupled with his admitted knowledge that he was aware that it was against the law to practice age discrimination, his admission that he suspected it had been done to him at the time of his termination, and that the fact that he did not pursue his rights until shown a newspaper article reporting a plaintiff's age discrimination verdict, leads to the conclusion that not only did the plaintiff have constructive notice, but he was far from diligent in pursuing his rights. We are not dealing here with an uneducated factory worker, but rather an intelligent man who was employed as a high level executive. There is little excuse for his conduct. Furthermore, it must be noted that one of the purposes of the time limitation is to give the employer early notice of a possible lawsuit, thus promoting the preservation of evidence and encouragement of negotiations to conciliate the complaint at the most apt time. The notice limitation of ADEA is,

> "intended to answer some of the disquiet in American business...keeping also in mind the practical problems of administration,..." 113 Cong. Rec. 35056 (Remarks of Senator Javits). It is logical that the 180-day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved. In turn this would promote good faith negotiation of employers during the 60-day conciliation period and provide an opportunity for preservation of evidence and records for use at a trial... . *Powell* v. *Southwestern Bell Tel. Co., supra,* 494 F.2d at 488.

Based on the evidence in this record, I must conclude that there is no cause for equitable relief. The motion to dismiss is hereby granted.

So Ordered.

Enter:
(s) RAYMOND J. PETTINE
Chief Judge
October 9, 1979

By Order,
(s) MICHELE L. HASTINGS
Clerk

APPENDIX D

United States Court of Appeals
For the First Circuit

No. 79-1541

VALENTINE R. CICCONE,

PLAINTIFF, APPELLANT,

v.

TEXTRON, INC., ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND
[HON. RAYMOND J. PETTINE, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Robert D. Parrillo, with whom *A. Lauriston Parks* and *Hanson, Curran & Parks*, were on brief, for appellant.
Michael P. DeFanti, with whom *Daniel K. Kinder* and *Hinckley, Allen, Salisbury & Parsons*, were on brief, for appellees.

March 17, 1980

CAMPBELL, *Circuit Judge*. Valentine R. Ciccone appeals from the district court's grant of summary judgment for defendants in this age discrimination action. The district court held that Ciccone's claim was barred by his failure to file a charge of age discrimination with the Department of Labor within 180 days of the most recent act of age discrimination he had alleged. Ciccone contends that the proper filing period should have been 300 days, as provided in 29 U.S.C. § 626(d)(2), because the alleged violations occurred in a so-called "deferral state." As we agree with the district court that the appropriate filing limit was 180 days, we affirm.

The Facts

Ciccone was born on May 18, 1924. From May 1971 to October 1974 he was employed by appellee Textron, Inc., as vice president, administration, of its Gorham Division. In October 1974 he became vice president, administration, in the Homelite Division of Textron. On May 26, 1977, he was terminated from his job at Homelite. Some seven months later, on January 4, 1978, believing that the position he once held at the Gorham Division was vacant, Ciccone wrote to Joseph B. Collinson, president of Textron, expressing an interest in "returning (again) to Textron."[1] Collinson responded by letter dated January 9, 1978, saying "it would be a mistake for you to return to Gorham, but if any other position becomes available . . . I'll contact you."[2]

On August 2, 1978, Ciccone filed charges of age discrimination with the United States Department of Labor and with the Rhode Island state agency designated for that purpose. These filings occurred 433 days after Ciccone's termination at Homelite and 205 days after Collinson's letter rejecting his application for the post at the Gorham Division. Sixty days passed without action by either state or federal authorities on Ciccone's claim. On October 10, 1978, Ciccone commenced this action in the district court alleging age discrimination in violation of the Age Discrimination in Employment Act, (ADEA), 29 U.S.C. §§ 621-634.

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[1] Ciccone's letter read as follows:

"Dear Joe:

News has a way of travelling fast . . . I learned today that my 'old' job at Gorham has been vacated.

Frankly, I would be interested in returning (again) to Textron, to this or any similar position which might present itself. I would appreciate hearing as to how best I could pro eed to explore any such opportunity."

[2] Collinson's letter read as follows:

"Dear Val:

I think it would be a mistake for you to return to Gorham, but if any other position becomes available in which I think you would be interested, I'll contact you."

In his district court complaint, appellant alleged, in substance, the facts recited above and stated that the conduct of defendants Textron and Collinson, "from and after May 26, 1977, with respect to the termination of the plaintiff's employment [*viz.* May 26, 1977] and refusal to consider the plaintiff for reemployment [*viz.* January 9, 1978] constitute[d] a continuing and willful violation of 29 U.S.C. § 623(a)." Defendants filed a motion to dismiss the complaint based on Ciccone's alleged failure to file timely charges with the federal and state agencies. Defendants also requested an order limiting discovery to the issue of subject matter jurisdiction until such time as the district court determined whether it had jurisdiction of the case. In support of their motion to dismiss, defendants filed an affidavit from J. Joseph Kruse, senior vice president, administration, of Textron, stating that the position of vice president, administration, at Gorham formerly held by appellant had been discontinued and the duties of the job reassigned to other members of the staff.

On February 5, 1979, the district court ruled that the proper filing deadline for Ciccone's claim was 180 days, and that his claims of age discrimination were thus time-barred unless he could establish special facts justifying an equitable tolling of the time limit. This was the court's principal basis for decision, and if correct, plainly barred claims based both on the May 26, 1977 discharge and the refusal to rehire on January 9, 1978. However, the court went on to speculate, in the alternative, as to what would happen were it to rule that 300 rather than 180 days were available. Were 300 days the yardstick, Ciccone was still too late (absent equitable tolling) to contest the May 26 discharge. Only if the January 1978 exchange of letters evidenced an ongoing or later violation would the 300 days help. On this question, the court was of two minds. It rejected the notion that a simple refusal to rehire for the

same job showed a "continuing" violation of the Act; but it saw possible merit in the theory that refusal to rehire for a different position might indicate a "separate" violation. Even so, however, the court felt that Ciccone had demonstrated no chance of prevailing here. According to the uncontradicted affidavit by Kruse, the Gorham job had been abolished by the time appellant applied. Thus the court saw no way Ciccone could prevail except by establishing an equitable tolling. On this issue alone, it allowed limited discovery to proceed.

On February 23, 1979, Ciccone's deposition was taken by counsel for defendants. In the course of his deposition, Ciccone stated that he had learned from sources at Gorham that his former position there had been filled by a younger man who had been given the title "Director of Administration." Appellant refused to name his sources. On the basis of this deposition, Ciccone then moved for reconsideration by the district court of its earlier finding that the January 1978 refusal to rehire did not amount to a separate violation of the Act. On April 13, 1979, the district court entered an order refusing to reconsider its earlier ruling until appellant had established that he was entitled to an equitable tolling of the 180-day filing deadline. After an evidentiary hearing on this issue, at which appellant testified, the district court ruled that appellant had failed to establish sufficient grounds for an equitable tolling.[3] Accordingly, on October 10, 1979, the district court entered judgment for the defendants on their motion to dismiss,

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[3] Since appellant does not challenge this finding on appeal, we have no occasion to decide under what circumstances, if any, the filing limitations of the ADEA are subject to equitable tolling. *Cf. Daughtry* v. *King's Department Stores, Inc.*, 608 F.2d 906, 909 (1st Cir. 1979) (per curiam). *Compare Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by an equally divided court*, 434 U.S. 99 (1977) *with Wright* v. *State of Tennessee*, 21 F.E.P. Cases 1347 (6th Cir. Jan. 24, 1980).

which was treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b)(6). This appeal followed.

I.

We turn first to appellees' contention that refusal to rehire Ciccone on January 9, 1978 did not and could not constitute a separate violation of the Act. This episode was the only purported violation which occurred within 300 days of Ciccone's filing of charges with the Department of Labor; hence if appellees are correct that the refusal to rehire was not a separate violation, it is irrelevant whether the proper filing limit was 300 days or 180. In either event appellant could not prevail. While it would be tempting to follow this route, thus avoiding the tricky problem of statutory interpretation involved in determining the proper time limit, we are unable to do so.

It is clear that the district court decided this case on the basis that 180 days rather than 300 days applied. Its ruminations on February 5 concerning the January 9 refusal to rehire were a kind of addendum to its basic holding that the 180-day limit applied; and they formed no part whatever of its final holding on October 10. In the initial, February 5, discussion the court said that merely refusing to rehire does not, by itself, establish a continuing violation. Such refusal, being but the natural consequence of the discharge, is attributable only to the earlier event. *See Goldman* v. *Sears, Roebuck & Co.*, 607 F.2d 1014, 1017-19 (1st Cir. 1979); *cf. United Airlines* v. *Evans*, 431 U.S. 553 (1977). The district court opined, however, that refusal to rehire for a job different from the one to which the discharge related might be a sufficient basis for claiming a separate violation. On this reasoning, the court said that Ciccone's claim of a separate violation in January 1978 had "somewhat more merit" than his claim of continuing violation. Nevertheless, the court went on to reject Ciccone's claim of separate violation on the ground that de-

fendants' then uncontroverted affidavit showed the job appellant had applied for at Gorham was discontinued. Since a refusal to hire cannot constitute a new violation in the absence of a job to be filled, *see Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 489 (5th Cir. 1974), the district court concluded that the refusal to rehire could not be a separate violation on the facts then before it.

This was how matters stood immediately after the court's February 5 decision. During the period the court allowed for discovery relating to the possibility of equitable tolling, however, the picture changed considerably. Ciccone claimed in his deposition that his old job at Gorham had been filled by a younger man who was given a different title; as a result, Ciccone moved to have the court reconsider its earlier holding that the January 9 incident was not a separate violation. The district court refused reconsideration, ruling that even if a separate violation were shown, Ciccone's claim would nonetheless be barred by the 180-day limit. The final order issued October 10, 1979 thus rested entirely on the premise that the appropriate benchmark was 180 days rather than 300. Since appellant had alleged no instances of discrimination within 180 days of his filing of charges, and had established no equitable grounds for tolling the time limit, the district court held his claim barred.

Under these circumstances, we reject appellees' invitation to address the question whether the refusal to rehire in January 1978 was insufficient, for summary judgment purposes, to establish a violation of the Act. This was not an issue which ultimately played any part in the court's judgment, nor is the proper resolution of this issue so plain on the present record as to invite us to avoid the question, decided below, of the proper filing limit under the ADEA.

II.

We turn, then, to the fundamental issue of the limitations period. As the case stands, legal proceedings were instituted more than 180 but less than 300 days after the last violation occurred. The statutorily conferred right to sue for relief from age discrimination is limited by 29 U.S.C. § 626(d),[4] which provides that no civil action may be commenced until 60 days after a "charge" of age discrimination has been filed with the Secretary of Labor. The statute goes on to state,

> "Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."

29 U.S.C. § 626(d). Section 633(b) concerns so-called "deferral states," *i.e.*, those having a state agency to which the

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[4] Section 626(d), as amended in 1978, provides:

> "No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary [of Labor]. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion."

individual must refer his claim at least 60 days before instituting his civil action.[5]

Appellant argues that the alleged violation in this case occurred in Rhode Island, that Rhode Island is a "deferral state" within the meaning of § 633(b),[6] and that therefore under § 626(d)(2) he was entitled to 300 days in which to file his charge with the Department of Labor, regardless of when he filed his state charges. Appellees respond that the statute can be construed to give a plaintiff the benefit of the § 626(d)(2) extended filing period only if he has actually invoked the state remedy within 180 days of the alleged violation. Each party cites legislative history and recent decisions by other circuits in support of its position. Each relies on the Supreme Court's decision in *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). While

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[5] Section 633(b) provides:

"In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided*, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority."

[6] The Rhode Island age discrimination law, R.I. Gen. Laws tit. 28, c. 6, §§1-16, declares age discrimination to be unlawful and establishes a procedure for processing of age discrimination complaints. Given our disposition of this appeal, we do not consider whether Rhode Island is, by virtue of this statute, a deferral state for purposes of 29 U.S.C. § 633(b). *Compare Hadfield* v. *Mitre Corp.*, 562 F.2d 84 (1st Cir. 1977) (Massachusetts is a deferral state) *with Lugo Garces* v. *Sagner International, Inc.*, 534 F.2d 987 (1st Cir. 1976) (Puerto Rico is not a deferral state).

the issue is close, we believe that appellees' interpretation is correct, and that charges of discrimination must be filed with the state agency in a deferral state within 180 days of the alleged violation for a plaintiff to qualify for the 300-day period within which to file federal charges.[7]

We recognize that the statute can be read, simplistically, as providing that the 300-day filing limit is automatically available to all plaintiffs residing in a deferral state even if plaintiff fails to initiate a state charge within 180 days. The Sixth Circuit points out, however, that the § 626(d)(2) extended period is an available alternative only in "a case to which Section 633(b) . . . applies," and we think it only sensible to infer that § 633 does not "apply" unless the complainant has diligently sought a state administrative remedy—if not within the state's limitations period, then at least within the generally longer 180 days afforded plaintiffs in a nondeferral state. *See Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), *vacated on other grounds*, 47 U.S.L.W. 3775 (1979). Any other reading would have Congress arbitrarily extending an additional 120 days in which to file the federal charge simply because the plaintiff's claim fortuitously arose in a deferral state. *See Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1231-32 (8th Cir. 1975) (en banc) (Title VII). The evident purpose of

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[7] Whether, as the district court and other courts believe, the statutory limitations may be subject to equitable amelioration in certain circumstances is an issue upon which we need express no opinion. *See* note 3 *supra*. The Fourth Circuit has suggested another possible exception, at least in the context of Title VII actions. Where plaintiff files his state charge more than 180 days after the alleged violation but within the limitations period provided by state law, the Fourth Circuit would permit plaintiff to file his federal charge up to 300 days after the alleged violation. *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326, 1332-33 (4th Cir. 1976). It is clear in the present case, however, that appellant did not comply with the applicable four-month state limitations period, R.I. Gen. Laws tit. 28, c. 6, § 10, and thus we do not consider whether this exception is available under the ADEA.

the extended filing period is to give the plaintiff a grace period within which to pursue state remedies he has invoked before being compelled to institute a federal charge.[8] This purpose would in no way be furthered by providing a windfall of 120 days to plaintiffs living in deferral states even though they had not instituted a charge with the state agency within the initial filing period. As the Sixth Circuit has said:

> "One obtains the benefits of the extended filing period in § 626(d)(2) *only* if he is in a 'deferral state' *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. . . . It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. . . . [A]ny state filing need only be within the minimum 180 days allowed for the federal filing, § 626(d)(1), in order to obtain the benefits of § 626(d)(2)."

Gabriele v. *Chrysler Corp., supra,* 573 F.2d 949, 955 (6th Cir. 1978) (emphasis in original); *see also Bonham* v. *Dresser Industries, Inc.,* 569 F.2d 187, 192 n.5 (3d Cir. 1977), *cert. denied,* 439 U.S. 821 (1978); *Skoglund* v. *Singer Com-*

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[8] This purpose is clearest in the legislative history of the comparable provision of Title VII, 42 U.S.C. § 2000e-5(e). *See, e.g., Olson* v. *Rembrandt Printing Co.,* 511 F.2d 1228, 1232 n.11 (8th Cir. 1975) (quoting 110 Cong. Rec. 12723 (1964)). Like the Supreme Court in *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 755-58 (1979), we consider the legislative intent of the Title VII Congress very helpful in discerning the purpose behind certain virtually identical provisions of the ADEA, such as § 626(d). *Cf. Loeb* v. *Textron,* 600 F.2d 1003, 1015 (1st Cir. 1979).

While not conclusive, the legislative history of the 1967 ADEA also suggests that the 300 days was intended to benefit plaintiffs who had initially resorted to state remedies:

> "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a State statute this period shall be *extended* to 300 days." (Emphasis supplied.)

S. Rep. No. 723, 90th Cong., 1st Sess., 113 Cong. Rec. 31251 (1967). *See also id.* at 31252.

pany, 403 F. Supp. 797, 803 (D. N.H. 1975); *cf. Olson* v. *Rembrandt Printing Co.,* 511 F.2d 1228, 1231-33 (8th Cir. 1975) (Title VII).

Appellant urges us to adopt the recent holding of the Ninth Circuit that "in a deferral state, an ADEA claimant may provide notice of intent to sue to the Secretary within 300 days of an alleged discriminatory act regardless of whether or not state proceedings have been timely commenced." *Bean* v. *Crocker National Bank,* 600 F.2d 754, 759 (9th Cir. 1979). Appellant argues that the Supreme Court's decision in *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750 (1979), undercuts the rationale of the earlier cases cited above. In *Evans,* the Court held that resort to state administrative procedures, pursuant to § 633(b), is required before plaintiffs can proceed with a civil action in federal court, but the filing of state charges need not be timely under state law. According to appellant, this holding implies that the extended filing period of § 626(d)(2) should be available without regard to the timeliness of plaintiff's resort to state remedies.

We disagree. The question presented here did not arise in *Evans* because plaintiff in *Evans* had filed his federal charge within 180 days of the alleged violation. The contention in *Evans* was that plaintiff need not file a notice of intent to sue with the state agency at all. *See Gabriele* v. *Chrysler Corp.,* 573 F.2d 949 (6th Cir. 1978) (vacated in light of *Evans,* 47 U.S.L.W. 3775 (1979)). The Supreme Court rejected this contention, holding that resort to state remedies—whether timely or not—was a prerequisite to maintenance of a federal court suit. The Court said nothing, however, to indicate that a deferral state plaintiff who waited more than 180 days before filing *any* administrative charge would nonetheless be entitled to the extended filing period. On the contrary, the only passage in the Court's opinion that even obliquely touched on this issue suggested

that the 180-day limit does apply to the filing of state charges in deferral states. In answering the argument that its decision to disregard state statutes of limitations would encourage plaintiffs to sidestep state procedures, the Court stated:

> "In any event, even if the risk of bypass of state agencies were real, which it is not, States could readily avoid the possibility by extending their limitations periods to 180 days and by tolling their statutes of limitations upon the filing of a timely charge with the Department of Labor."

441 U.S. at 764 n.11. As we read it, this statement implies that the state limitations period on filing of state charges will be harmonized with the federal period for filing such charges if both are set at 180 days. There is certainly no implication here that state and federal charges can be filed concurrently *more than* 180 days after an alleged violation. While this language is, to be sure, less than conclusive, it undercuts appellant's contention that *Evans* is inconsistent with our resolution of the issue in the present case.

We hold that the district court correctly interpreted and stated the statutory period applicable upon the present facts.

Affirmed.

Supreme Court, U. S.
FILED
SEP 12 1980
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No. 79-1970

In the Supreme Court of the United States

OCTOBER TERM, 1979

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON, INC.,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM UNDER RULE 22.6

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---

PETITIONER'S SUPPLEMENTAL MEMORANDUM UNDER RULE 22.6

Petitioner in his petition for a writ of certiorari to the United States Court of Appeals for the First Circuit raises the issue of whether an age discrimination charge brought in a deferral state is timely if it is filed less then 300 days but more than 180 days after the act of discrimination.

Subsequent to petitioner filing his petition for a writ of certiorari this Court handed down its decision in *Mohasco Corporation* v. *Silver*, 100 S.Ct. 2486 (1980). Although *Mohasco* dealt with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (1976) (hereinafter Title VII) rather than the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* (1976) (hereinafter ADEA), petitioner submits that *Mohasco* controls this case.

Mohasco discredited the cases relied upon by the First Circuit Court in its opinion challenged here. Specifically, the First Circuit Court relied upon *Olson* v. *Rembrant Printing Co.*, 511 F.2d 1228 (8th Cir. 1975), which held that in order to be entitled to the longer claim-filing period allowed in deferral states, a Title VII claimant must file with either the state or federal agency within 180 days of the act of discrimination. *Mohasco* repudiated *Olson and held that a complaintant in a deferral state is required only to file not more than 300 days after the discriminatory act. 100 S.Ct. at 2490, n.16, 2491, n.19. The statutory provisions regarding filing time requirements should be given their plain meaning, especially where (as in Title VII and ADEA cases) laymen institute the charges. 100 S.Ct. at 2491, n.19.*

While Mohasco and *Olson* dealt with Title VII cases, it was noted in *Mohasco* that the filing requirements of Title VII and the ADEA are similar, 100 S.Ct. at 2490, n.16. Furthermore, when discussing *Olson* this Court cited the case at bar, *id.*, thus clearly indicating that the holding on filing requirements for Title VII cases would be the same in ADEA cases. *See Davis* v. *Calgon Corporation*, No. 79-2606 (3d Cir. August 1, 1980) (attached as Appendix E) A-6—A-7.

In addition to *Mohasco* recent decisions by the United States Court of Appeals for the Third Circuit are significant. On June 10, 1980 that court handed down *Davis* v. *Calgon Corporation*, 22 F.E.P. Cases 1761 (3d Cir. 1980), a case which involved substantially the same facts and the identical issue presented by the case at bar. The Third Circuit Court initially agreed with the First Circuit Court and held that an ADEA claimant in a deferral state must file within 180 and not 300 days of the alleged discriminatory act.

Thereafter, this Court issued its opinion in *Mohasco*. the Third Circuit Court granted a request for reargument and on August 1, 1980, relying upon *Mohasco*, reversed its June 10, 1980 opinion. *Davis* v. *Calgon Corporation, supra.* (Appendix E).

Another development which arose subsequent to the filing of this petition for a writ of certiorari is the case of *Ewald* v. *Great Atlantic & Pacific Tea Company, Inc.*, 620 F.2d 1183 (6th Cir.) *petition for cert. filed* August 4, 1980, No. 80-208. That case, too, is essentially a mirror image of the case at bar. Like this case *Ewald* was returned prior to the issuing of *Mohasco*. Unlike this case, however, there was a strong dissent by Circuit Judge Jones. 620 F.2d at 1189-90. The dissent is similar to this petitioner's argument in that Judge Jones believes that to require an ADEA claimant in a deferral state to file within 180 days is to ignore the plain language of 29 U.S.C. § 626(d) and to rewrite the statute to include filing requirements not declared by Congress.

When the instant petition for writ of certiorari was filed the First Circuit Court and Ninth Circuit Court (*Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979)) were at odds on the issue presented. At present the First Circuit and Sixth Circuit (*Ewald*) disagree with the Ninth Circuit and Third Circuit (*Davis* v. *Calgon Corporation, supra*) on the question.

As the Third Circuit Court has recognized, the foundation of the opinion of the First Circuit Court has been destroyed by *Mohasco*. For that reason, as well as for the reasons set forth in the petition for writ of certiorari and Judge Jones' dissent, petitioner again respectfully urges this Court to issue its writ of certiorari so that the judgment and decision of the United States Court of Appeals for the First Circuit may be reviewed.

Respectfully submitted

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2606

LAWRENCE E. DAVIS,

Appellant

v.

CALGON CORPORATION, a corporation

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civ. No. 79-0692)

Argued March 19, 1980
Panel Rehearing Granted July 1, 1980
Resubmitted under Third Circuit Rule 12(6)
July 8, 1980
Before: SEITZ, *Chief Judge*, and
WEIS and HIGGINBOTHAM, *Circuit Judges*
(Filed August 1, 1980)

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OPINION OF THE COURT

Per Curiam:

Plaintiff Lawrence E. Davis appeals from a final order of the district court that granted defendant Calgon Corporation's motion to dismiss. The district court dismissed plaintiff's age discrimination complaint because it found that Plaintiff had not satisfied the preconditions to suit specified in the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* (1976) (ADEA).

I.

Plaintiff's complaint alleges that he was employed as an executive by defendant from 1967 until his employment was terminated on June 30, 1978, at age 55. Plaintiff asserts that his discharge violated the ADEA[1] because it was done in furtherance of a general corporate policy adopted by defendant of demoting and terminating its executives solely on account of age and replacing them with individuals under the age of 40.

On January 29, 1979, 213 days after his discharge, plaintiff filed a complaint alleging age discrimination with the Pennsylvania Human Relations Commission (the PHRC). Ten days later, he filed a charge with the Secretary of Labor (the Secretary).[2] After receiving notice from the PHRC that it had terminated state proceedings and from the Secretary that he had concluded conciliation efforts, plaintiff filed suit in the district court.

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[1] Although plaintiff's complaint also refers to the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* (1976), we do not read his factual recitals to assert an independent cause of action or claim for relief under this statute.

[2] At that time, the ADEA required the plaintiff to file a charge with the Secretary. *See* 29 U.S.C.A. § 626(d) (West 1979 Supp.). Under Reorg. Plan. No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) (effective July 1, 1979), all functions vested in the Secretary under § 626(d) were transferred to the EEOC. Because this case arose prior to the effective date of the reorganization, we will refer only to the Secretary in this opinion.

Defendant moved to dismiss plaintiff's complaint on the ground that plaintiff had not filed his charge with the Secretary within the time limits prescribed in the ADEA, 29 U.S.C.A. § 626(d) (West 1979 Supp.). Section 626(d) provides that such a charge shall be filed:

> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Section 633(b) which deals with the relationship between federal and state age discrimination actions, applies to ADEA claims based on alleged unlawful practices occurring in "deferral states." These are states having a law prohibiting age discrimination in employment and establishing a state authority to grant or seek relief from such discrimination.

Plaintiff filed both his state and federal claims after 180 days but before 300 days. Because Pennsylvania is a deferral state, *see Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 194 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978); Pa. Stat. Ann. tit. 43, §§ 955-957 (Purdon 1964 & 1979 Supp.), plaintiff argues that he is entitled to the 300-day period specified in § 626(d)(2) and that therefore his charge of age discrimination was timely filed with the Secretary. The district court disagreed, finding that the 300-day filing period was available only where "timely invocation of the State remedy occurred." The court found that plaintiff's filing with the PHRC was not timely and that a 180-day period for filing with the Secretary applied in this case. Therefore, it concluded that plaintiff's failure to file a charge with the Secretary within 180 days precluded this suit.

The basis of the district court's conclusion that plaintiff's filing with the PHRC was not timely is unclear. The court may have found the filing untimely either because plaintiff did not file with the PHRC within the 90-day state statute of limitations, *see* Pa. Stat. Ann. tit. 43, § 959 (Purdon 1979 Supp.), or because he did not make the state filing within 180 days. We are unable to determine which of these time limits was relied upon by the district court. Therefore, we must consider both of them to determine whether the district court's decision to dismiss plaintiff's complaint was correct.

A.

In *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the Supreme Court held that although the ADEA makes resort to state procedures mandatory for claims arising in deferral states, a plaintiff is not required to commence the state proceedings within the time limits set by state law to preserve his federal remedy. The Court stated that "state procedural defaults cannot foreclose federal relief and that state limitations periods cannot govern the efficacy of the federal remedy." *Id.* at 762. Therefore, plaintiff's failure here to comply with the state statute of limitations cannot bar his ADEA suit and cannot support the district court's decision.

B.

Defendant argues, however, that the extended period for filing a charge with the Secretary provided in § 626(d)(2) applies only when a plaintiff files with the state within the shorter federal period of 180 days and that the district court based its decision on plaintiff's failure to file with the state within this period. It contends that the district court properly granted its motion to dismiss because plaintiff did not file

with the PHRC until more than 180 days after his discharge and, consequently, that plaintiff was not entitled to 300 days to file with the Secretary.[3]

Defendant relies on a number of cases decided under both Title VII and the ADEA that have construed the filing limits for these statutes to require deferral state plaintiffs to file with the state within the 180 day federal period to be entitled to an extended period for filing with the proper federal authority. *See, e.g., Ewald* v. *Great Atlantic & Pacific Tea Co.*, No. 77-1600 (6th Cir. May 9, 1980) (ADEA); *Ciccone* v. *Textron, Inc.* 616 F.2d 1216 (1st Cir.), *petition for cert. filed*, 48 U.S.L.W. 3839 (June 24, 1980) (No. 79-1970) (ADEA); *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975) (in banc) (Title VII). However, since the present case was argued in this court, the Supreme Court has expressly rejected the reasoning of these cases and adopted a literal reading of the filing provisions of Title VII. *See Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851 (June 23, 1980).

Although the precise issue presented in *Mohasco* concerned the meaning of the term "filed" in subsections (c) and (e) of § 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (c),(e) (1976), the Court examined *Olson* and its progeny in two footnotes. 48 U.S.L.W. at 4852-53 n.16, 19. It found

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[3] Defendant asserts that two prior decisions of this court control our determination of this issue. *See Holliday* v. *Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221 (3d Cir. 1978) (in banc); *Bonham* v. *Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). In *Holliday*, the plaintiff filed with the Secretary 168 days after his discharge. Thus, we were not presented with any question concerning the applicability of the extended filing period. Defendant also relies on a footnote in *Bonham*. *See* 569 F.2d at 192 n.5. We are unsure, however, whether the statement in this footnote survives the Supreme Court's decision in *Evans*, and therefore, we choose not to rely on it in this case.

that the *Olson* court's interpretation of the time limits imposed by § 706(e) was not supported by the statute because "Congress included no express requirement that state proceedings be initiated by any specific date in the portion of [subsection (e)] that relates to time limitations in deferral States." *Id.* at 4853 n.19. The Court concluded by stating that:

> we do not believe that a court should read in a time limitation provision that Congress has not seen fit to include . . . at least when dealing with "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process."

Id. (quoting *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972)).

While *Mohasco* involved the time limitations of Title VII, we find the Supreme Court's statements equally applicable to the ADEA. First, we have recognized that interpretations of similar language in Title VII can provide guidance for interpretation of the ADEA. *See Ricks* v. *Delaware State College*, 605 F.2d 710, 712 (3d Cir. 1979) (applying rule for when time limitations of ADEA begin to run to similar time limits in Title VII), *cert. granted*, 100 S.Ct. 1012 (1980). *See also Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979).

Moreover, in its discussion rejecting the *Olson* approach, the Court also cited *Ciccone* v. *Textron, Inc.*, *supra*, a case that relied on *Olson* to hold that an ADEA plaintiff must file with the state within 180 days to be entitled to the extended filing period of § 626(d)(2). Finally, the ADEA, like Title VII, is a statutory scheme in which laymen, unassisted by counsel, often initiate the process. *See Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 761.

Nothing in the language of § 626(d)(2) imposes on deferral state plaintiffs a duty to file with the state within

180 days to be entitled to the extended filing period in which to file with the Secretary. Regardless of what our own conclusions would be, we find that the Supreme Court's statements in *Mohasco* control disposition of this issue, and we refuse to "read in a time limitation provision that Congress has not seen fit to include." Therefore, we hold that a plaintiff in a deferral state is entitled to the extended period provided by § 626(d)(2) regardless of whether he has filed a state administrative complaint within 180 days after the alleged discrimination occurred. *Accord, Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979). Because the plaintiff in this case filed a charge with the Secretary 223 days after his discharge, his filing was timely, and the district court erred in dismissing his complaint.

III.

The order of the district court dismissing plaintiff's complaint will be reversed.

FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1970.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

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No. 79-1970.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

VALENTINE R. CICCONE,
PETITIONER,

v.

TEXTRON INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

Question Presented.

Must an ADEA claimant in a deferral state file his state claim within the 180 days provided by § 626(d)(1) to obtain the benefit of the extended filing period provided by § 626(d)(2) of the Act?

Statement of the Case.

Respondent accepts petitioner's statement of the case with the following exceptions:

1. Respondent does not concede that Rhode Island is a deferral jurisdiction within the meaning of § 633(b) of the Age Discrimination in Employment Act, except that respondent assumed *arguendo* for purposes of its motion to dismiss in the district court that Rhode Island was a deferral jurisdiction.

2. Respondent's argument below, as here, was that petitioner was entitled to the 300 day filing period, § 626(d)(2), only if he had actually filed with a local agency within the 180 day filing period, § 626(d)(1), and needed additional time for federal filing in order to allow the state sufficient time to exhaust its own procedures.

Summary of Argument.

A literal reading of the statute is contrary to the legislative history of the Act, frustrates other clear congressional purposes, and attributes to Congress purposes elsewhere rejected by this court.

Since this court has rejected a statutory construction which would result in a federal remedy that fluctuates with the vagaries of state law, the circuit was compelled to reject a literal reading of the ADEA which would result in a fluctuating federal remedy depending on the actions of state legislatures.

There is a conflict in the Circuits.

Argument.

I. Neither Prior nor Subsequent Decisions of This Court Require a Result Other Than That Reached by the First Circuit.

Subsequent to the filing of this petition, the Court issued an opinion in *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851 (U.S. June 23, 1980), indicating in notes 16 and 19 that it was inclined to read § 706(e) of Title VII literally, absent clear evidence that Congress intended it to be read otherwise. The Court suggested that § 626(d) of the ADEA might be read literally for the same reason and made specific reference to the First Circuit opinion petitioner is seeking to have reviewed.

The statutory schemes for ADEA and Title VII are different. Title VII mandates sequential filing with the state and federal agencies while ADEA permits concurrent filing. In spite of the allowance for concurrent filings, Congress did retain the extended filing period for deferral states when the ADEA was passed. The legislative history suggests that, contrary to a literal reading of the statute, the purpose of the extended filing period was to accommodate those who chose to first file with the state *during the initial federal filing period.*[1]

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[1] "[I]n the case of suits brought by individuals notice of intention to sue must be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred, except that where action *has been commenced* under a state statute this period shall be *extended* to 300 days." (Emphasis added.) Cong. Rec. S.830, Comm. Rep. No. 723, 113 Cong. Rec. 31251 (90th Cong. 1st Sess. 1967).

"[T]he notice to be filed by an individual who wishes to bring suit must be filed within 180 days of the occurrence of the alleged unlawful practice, except that where a state *has undertaken* action in accordance with its laws, an individual must file his notice within 300 days of the alleged unlawful practice." (Emphasis added.) Section by Section Analysis, Cong. Rec. S.830, 90th Cong. 1st Sess., 113 Cong. Rec. 31252 (1967).

Additionally, a literal reading of the statute, if allowed, would frustrate other clear Congressional purposes. Finally, it would require the Court to attribute to Congress an intent to discriminate between both claimants and employers, attributions that this Court has otherwise refused to make.

The § 626(d) language is borrowed from Title VII. *See* 42 U.S.C. § 2000e-5(e). The original Title VII Act required claimants to file with the federal agency within 90 days of the alleged act of discrimination. While the legislative history does not disclose why 90 days was the period specified, courts, including this one, have concluded that the relatively short filing periods in Title VII and the ADEA were for the benefit of employers. For Title VII, *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. at 4854; for ADEA, *Powell* v. *Southwestern Bell Telephone Co.*, 494 F.2d 485, 488 (5th Cir. 1974); *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd by an equally divided Court*, 434 U.S. 99 (1977).

Discrimination disputes are not like auto accidents. The occurrence of an accident immediately puts everyone involved on notice that claims may be asserted. An employer may be unaware that an employee believes he has been the victim of discrimination until the employer receives notice of the employee's claim. Claimants are required to file with the federal agency in order to ensure that the employer will receive notice of the claim. The employer, if he believes discrimination has occurred, can then attempt to resolve the matter before damages grow to astronomical proportions. If the employer believes that discrimination has not occurred, he will have an early opportunity to gather his evidence in order to defend against the claim.[2]

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[2] The original House and Senate bills have no filing limitations. *Age Discrimination in Employment, Hearing on H.R. 3651, 3768 and 4221 Before the General Subcomm. on Labor of the House Comm. on Education and*

Another aim of Title VII legislation was that claimants first resort to local agencies. *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1232, n.11 (8th Cir. 1975) (Remarks of Senators Humphrey and Dirkson). To ensure that result, Congress mandated sequential filing. 42 U.S.C. 2000e-5(c). Federal filing was prohibited for as long as 120 days so that the state agencies might first attempt to resolve the dispute.

Congress found that the two Title VII purposes — early notice to employers (accomplished by filing with the appropriate federal agency) and first resort to state agencies — conflict. A Title VII claimant in a deferral state could find himself required to file with the federal agency within 90 days but prohibited from filing with the federal agency for 120 days. Congress then provided an extended filing period of 210 days (90 plus 120) for those in deferral states, so that first resort could be made through state agencies without jeopardizing the federal remedy.

In passing the ADEA, Congress eliminated the sequential filing requirement, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756-757 (1979), but retained the extended federal filing provisions. Section 626(d)(2). Since the ADEA has no sequential filing requirement, the federal right is not jeopardized and a claimant can file with the federal agency at any time within the 180 day period.

Labor, 90th Cong., 1st Sess. 1 (1967); and *Hearing on S.788 and 830, Before Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. p.1 & 17 (1967).

Subsequently the Senate Committee adopted filing requirements. In conference, the House yielded. *See* 113 Cong. Record 31248 *et seq.* (1967), 34738 *et seq.* (1967), 35055 (1967), 35133 (1967). During the course of the dispute, Senator Javits commented that the Senate version "deals with some of the concerns of American business that the legislation would be open ended." 113 Cong. Record 35056 (1967).

For commentary at hearing regarding the need for time limitations, *Statement of the Air Transport Association, House Hearings, supra* at 469 and *Senate Hearings, supra* at 221-222.

Therefore, the extended federal filing provision is not necessary to protect claimants against loss of the federal remedy by reason of mandatory sequential filing, and must have some other purpose. Petitioner contends that the plain language of the section means that Congress intended simply to grant claimants in deferral states a bonus of an extra 120 days in which to file. In essence, petitioner contends that Congress arbitrarily created two separate filing periods — one for those in deferral states and another in non-deferral states.

Read literally, § 626(d) requires claimants in non-deferral states to file with the federal agency within 180 days. Claimants in deferral states are granted a 300 day filing period. The only requirement for obtaining the 300 day filing period is that claimant be in a deferral state. A literal reading of § 626(d) requires this Court to assume that Congress intended:

1. To grant a bonus to claimants in deferral states;
2. To require less diligence from claimants in deferral states than claimants in non-deferral states;[3]
3. To grant less notice to employers in deferral states than employers in non-deferral states;
4. To create an uneven federal remedy which fluctuates with the vagaries of local legislation — a concept specifically rejected in *Oscar Mayer* v. *Evans*, *supra* at 761-63; and
5. To have completely abandoned any desire to encourage first resort to local agencies. Since the extended period is available even if claimants do not first try local remedies, the ADEA contains no incentive for claimants to first work through the state.

The above assumptions would have Congress intending to create an illogical and arbitrary scheme. The legislative

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[3] See *Mohasco Corp.* v. *Silver*, *supra* at 48 U.S.L.W. 4854. ("But neither this latter provision nor anything else in the legislative history contains any 'suggestion that complainants in some states were to be allowed to proceed with less diligence than those in other states'.")

history does not support such assumptions. Some are contrary to the express desires of Congress and others have been rejected by this Court.

Respondent submits that Congress, while not mandating that ADEA claimants first resort to state agencies, desired to encourage such resort on a voluntary basis. By retaining the extended filing period, § 626(d)(2), Congress granted an extended federal filing period to those who voluntarily allowed the state to try its hand before resorting to the federal remedy.

It is further submitted that Congress never intended to abandon the early notice provision and give employers in deferral states less notice than those in non-deferral states.

Congress simply intended that claimants who voluntarily resorted first to the state agency *within the 180 day filing period provided by § 626(d)(1) and who thereby put the employer on notice,* be given an additional 120 days for federal filing, during which time the state agency would have time to attempt to resolve the matter locally. By requiring ADEA claimants to file their state claims within the 180 days provided by § 626(d)(1) in order to obtain the benefit of the extended filing period of § 626(d)(2), both of Congress' purposes are accomplished. Since some filing occurs within 180 days, employers in deferral states receive early notice and are treated equally with employers in non-deferral states. Claimants are encouraged to resort to state remedies and those who meaningfully pursue state remedies are given additional time for federal filing if they remain unsatisfied (the opportunity for two bites of the apple). This statutory construction results in the same diligence being required of all claimants, whether they are in a deferral state or a non-deferral state: a uniform federal remedy is provided.

While Congress may not have directly answered the question before the Court, Congressional purposes are apparent from the statutory scheme and the Congressional history. A

literal reading of § 626(d) would frustrate those purposes and would require the Court to assume that Congress intended to provide disparate remedies and to treat employers and claimants unequally. The First Circuit's construction of the statute harmonizes the Act and accomplishes all its purposes. By requiring a claimant to file *somewhere* within 180 days, all claimants and employers are treated equally. Early notice is provided. Those who fulfill Congress' desire that they first try state remedies are granted an extended federal filing period if necessary. As the Sixth Circuit states in *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978), *vacated on other grounds*, 442 U.S. 908 (1979): "This is far from 'judicial legislation' but rather "is" a judicial harmonization of a statutory package which is admittedly less than a model of clarity. This is a proper function for courts and one we are called upon to perform regularly."

Respondent recognizes that the ADEA is humanitarian legislation where laymen initiate the process. However, solely because a claimant would receive broader rights, the Court should not construe the statute in a manner thwarting clear Congressional purposes and requiring the Court to attribute discriminatory intent to Congress.

Petitioner also contends that the First Circuit's opinion is contrary to the decision of this Court in *Oscar Mayer & Co.*, 441 U.S. 750 (1979). In effect, petitioner contends that *Oscar Mayer* compels the conclusion reached by the Ninth Circuit. *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979).

In the present case, the question was whether an ADEA claimant in a deferral jurisdiction must file his state claim within the 180 day period provided by § 626(d)(1) in order to obtain the benefit of the extended filing period provided by § 626(d)(2). That question was not before the Supreme Court in *Oscar Mayer* since claimant there had filed with the federal agency within 180 days of the alleged act of discrimination.

Evans v. *Oscar Mayer & Co.*, 580 F.2d 298, 299 (8th Cir. 1979).

The question of state filing in *Oscar Mayer* was whether a *timely* state filing was an ADEA jurisdictional prerequisite. This Court answered in the negative and held state limitation periods irrelevant to ADEA jurisdiction so that a state's limitation period would not, in effect, become the federal filing period. The Court rejected the concept that the federal remedy was intended to fluctuate in accordance with the vagaries of state legislation.

In response to the argument that such a holding would encourage claimants to bypass state procedures, the Court noted that states could avoid the problem by providing 180 day filing periods and staying that period in the event of a federal filing. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 764, n.11. Thus, the Court emphasized the 180 day filing period and the need for a uniform federal remedy.

Petitioner in this case contends that the First Circuit's holding that the state filing must be within 180 days of the alleged act of discrimination is inconsistent with this Court's holding in *Oscar Mayer* that the state filing may be made at any time. Petitioner ignores the fact that the holdings were made in different contexts and for different purposes.

In this case the Circuit held that a claimant must file with the state within 180 days in order *to obtain the benefit of the extended filing period under the federal act*. To hold otherwise would simply grant a 120 day bonus to those in deferral states. A claimant in a non-deferral state would be required to file within 180 days. A claimant in a deferral state would have 300 days. The federal remedy would fluctuate depending on the vagaries of state law — the very result the Court sought to avoid in *Oscar Mayer*.

In *Oscar Mayer*, the Court also emphasized Congressional purposes as evidenced by the legislative history and the Act it-

self. The First Circuit likewise looked to Congressional intent. The statutory sections in question were intended to provide early notice to employers, § 626(d)(1), and encourage first resort to local agencies. Section 633(b). Where these purposes conflicted so that first resort to the state agency might jeopardize the federal remedy, Congress provided an additional 120 days for federal filing to give the state time to try its hand, § 626(d)(2). To accomplish both purposes, the Circuit held that a claimant must actually file with the state within the 180 days provided in § 626(d)(1) in order to obtain the extended filing period of § 626(d)(2). If the state filing occurs within 180 days, early notice to employers is provided. If such state filing is made (fulfilling the Congressional purpose), claimant receives an additional 120 days for federal filing and his opportunity for federal remedy is not jeopardized while the state attempts to resolve the matter locally.

If petitioner's interpretation is accepted, the Congressional intent to provide early notice (180 days) is frustrated in deferral states. Such interpretation also eliminates any incentive for claimants to resort first to local agencies since they would receive the extended filing period even if they did not first resort to state remedies. The extended filing period becomes a gratuity to those in deferral states. Finally, such an interpretation creates a fluctuating federal remedy dependent on the actions of local legislatures.

Thus, there is no conflict between *Oscar Mayer* and the First Circuit's decision, and *Oscar Mayer* actually requires the result reached by the First Circuit.

II. There is a Conflict Between the Circuit Courts of Appeal.

Respondent agrees that the Ninth Circuit Court of Appeal has rendered a conflicting opinion on the precise issue before

the Court. *Bean* v. *Crocker National Bank*, 600 F.2d 754 (9th Cir. 1979). It should be noted that the First Circuit is the first Court of Appeals to have considered the question subsequent to *Oscar Mayer & Co.* v. *Evans, supra*, where the court has had the benefit of briefs and argument of counsel regarding the impact of *Oscar Mayer*.

In *Bean*, the primary issue before the Court was whether state filing was a prerequisite to a federal suit brought under the ADEA. Apparently the Ninth Circuit was aware that the same question was before this Court in *Oscar Mayer*. The *Oscar Mayer* opinion issued on May 21, 1979 held state filing mandatory. The Court also held that compliance with state filing period limitations was irrelevant to ADEA jurisdictional questions. Otherwise, the state filing limitations would become, in effect, the federal limitation period, again resulting in a fluctuating federal remedy dependent on the actions of local legislatures.

The *Bean* court, without noting the context of the *Oscar Mayer* holding, concluded that the *Oscar Mayer* holding that state limitation periods are irrelevant compelled the conclusion that an ADEA claimant in a deferral state is entitled to 300 days in which to file with the federal agency.

The issue before the First Circuit and this Court, however, does not relate to compliance with state limitation periods. The issue is whether an ADEA claimant simply receives a 120 day bonus filing period by virtue of being in a deferral state, or whether he must actually resort to the local agency within the 180 day filing period provided by § 626(d)(1) in order to obtain the extended period provided by § 626(d)(2). The only filing periods in question are federal. The Ninth Circuit did not consider the question in that context and consequently did not consider the Congressional purposes of providing a 180 day notice to employers and encouraging first resort to local agencies. It did not consider this Court's rejection in *Oscar Mayer*

of a statutory interpretation that results in the federal remedy fluctuating with the vagaries of diverse state statutes.

The First and Ninth Circuits offer differing answers because, in essence, they were addressing different questions. The other circuits addressing this question have rendered opinions consistent with the First Circuit. *Ewald* v. *Great Atlantic & Pacific Tea Co.*, 22 FEP Cases 1263 (6th Cir. May 5, 1980); *Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 955 (6th Cir. 1978) (dictum), *vacated on other grounds*, 442 U.S. 908 (1979); *Davis* v. *Calgon Corp.*, 22 FEP Cases 1761 (3d Cir. June 10, 1980) rehearing granted in light of *Mohasco Corp.* v. *Silver*, (79-2606, 3d Cir. July 1, 1980); *Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n.5 (3rd Cir. 1977) (dictum), *cert. denied*, 439 U.S. 821 (1978).

Conclusion.

Since the Circuit Court had adequate evidence of Congressional purposes before it, it permissibly construed the statute in a manner consistent with those purposes.

The Petition for Certiorari should be denied.

Respectfully submitted,

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Respondent's Supplemental Brief.

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TEXTRON, INC.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondent's Supplemental Brief.

Petitioner has filed a supplemental brief arguing that the opinion of this Court in *Mohasco Corporation* v. *Silver*, 100 S.Ct. 2486 (1980) is dispositive of the issue before the Court. Petitioner submits two bases for the contention. First, the Circuit relied on Title VII cases which have been discredited by *Mohasco* and, second, that the ADEA filing requirements being similar to the Title VII filing requirements must be interpreted in the same manner. Both contentions lack merit.

The Circuit Court opinion, *Ciccone* v. *Textron, Inc.*, 616 F.2d 1216 (1st Cir. 1980), demonstrates that primary reliance was placed on ADEA decisions of other Circuit and District Courts. The Circuit states at 1221:

> "As the Sixth Circuit has said:
>
> > 'One obtains the benefits of the extended filing period in § 626(d) (2) *only* if he is in a 'deferral state' *and* elects to use that state's mechanisms to attempt a conciliation of the grievance. . . . It is only if one uses time to let the state try its hand that he needs more time to notify the Secretary of Labor. . . . [A]ny state filing need only be within the minimum 180 days allowed for the federal filing, § 626(d) (1), in order to obtain the benefits of § 626(d) (2).'
>
> *Gabriele* v. *Chrysler Corp., supra,* 573 F.2d 949, 955 (6th Cir. 1978) (emphasis in original); *see also Bonham* v. *Dresser Industries, Inc.*, 569 F.2d 187, 192 n.5 (3rd Cir. 1977), *cert. denied,* 439 U.S. 821, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); *Skogland* v. *Singer Company,* 403 F.Supp. 797, 803 (D.N.H. 1975); *cf. Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228, 1231-33 (8th Cir. 1975) (Title VII)."

Petitioner's suggestion that the Circuit anchored its opinion to Title VII cases is inaccurate.[1]

In *Mohasco,* the Court indicated in note 19 that a court should not read time limitations into an act not required by the literal language, citing *Occidental Life Insurance Company* v.

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[1] [Respondent notes that the Sixth Circuit's holding was *dictum.* However, the Sixth Circuit subsequently affirmed its position. *Ewald* v. *Great Atlantic & Pacific Tea Co.*, 620 F.2d 1183 (6th Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3134 (U.S. Aug. 4, 1980).

EEOC, 432 U.S. 355 (1977). *Occidental* stands for the proposition that "[o]nly if the legislative history . . . provide[s] firm evidence that the [Act] cannot mean what it so clearly seems to say would there be any justification for construing it in any other way." *Id.* at 361. In *Mohasco*, the Court refused to read a time limitation into Title VII because the Title VII legislative history did not sufficiently evidence such a Congressional intent.

There is, however, substantial evidence that Congress did intend a more restrictive interpretation of the extended filing period in the ADEA than required by a literal reading of § 626(d) (2). Since Congressional intent relating to the ADEA was not reviewed in *Mohasco*, *Mohasco* cannot be dispositive of the question now before the Court.

While there are substantial similarities between the filing requirements of Title VII and the ADEA, there is a critical difference indicating that the Congressional purposes in providing an extended filing period in deferral states are different for the ADEA and Title VII. Title VII mandates sequential state and federal filings while the ADEA permits concurrent filings. Originally, Title VII required a federal filing within 90 days but also prohibited federal filing in deferral states for as long as 120 days. The Act conflicted on its face. To resolve the conflict, Congress provided claimants in deferral states an additional 120 days for federal filing so that their federal remedy would not be lost during the mandatory deferral period.

The ADEA does not mandate sequential filing. The provisions of the Act do not conflict. Unlike Title VII, no extended filing period is necessary to reconcile other provisions of the ADEA. Therefore, the Title VII legislative history is not dispositive of Congress' purposes in providing an ADEA extended filing period.

Petitioner contends the Congressional purpose in providing an ADEA extended filing period is expressed by the literal

language of the Act — a separate longer filing period for those in deferral states. A bonus. Respondent contends the Congressional purpose was only to accommodate claimants whose state filings fulfill the purposes of § 626(d) (1) — early notice to employers and agencies — and § 633(b) — first resort to local remedies. Those who substitute a state filing for the federal filing required by § 626(d) (1), thereby fulfilling the underlying Congressional purposes, are granted a grace period for their federal filing during which the state may try to resolve the matter locally.

While the legislative history relating to § 626(d) (2) is sparse, it is clear.[2] Congress did not intend a bonus but rather an accommodation for those who first pursued state remedies. Though the legislative history relating to § 626(d) (2) is not explicit as to when state filing must occur, § 626(d) (1) informs us that Congress intended that employers and the remedial agency receive 180 days notice of the alleged act of discrimination. Reviewing §§ 626(d) (1) and 626(d) (2) and their histories in *pari materia* makes it apparent that the accommodation provided by § 626(d) (2) was intended only for those who fulfilled the underlying purposes of § 626(d) (1) by means of a state filing. Such an interpretation is butressed by its consistency with Congress' intent to encourage voluntary first resort to local remedies as evidenced by § 633(b).

The legislative history of § 626(d) (2) together with the ADEA itself demonstrates that a literal reading of § 626(d) (2) is not appropriate. Unlike Title VII, there is evidence that a

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[2] For text of history, see respondent's Brief in Opposition to Petition to Writ of Certiorari, at 3 n.1.

restrictive reading of ADEA language was intended. Disposition of the controversy based on the Title VII legislative history reviewed in *Mohasco* without examination of the statutory scheme, the legislative history and the consequences of a literal reading of § 626(d) (2) of the ADEA is unwarranted.

Respectfully submitted,

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